Supreme Court, U.S.
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No. 03

IN THE

Supreme Court of the United States

ESSEF CORPORATION, PAC-FAB, INC., AND STRUCTURAL EUROPE N.V.,

Petitioners,

v.

JOHN AND JOYCE SILIVANCH, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it was error for the court below to conclude, in conflict with precedents of multiple courts of appeals and of this Court, that an attorney's mistake of fact precluded a finding of excusable neglect based on the equitable balancing of all relevant circumstances this Court prescribed in *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993).

LIST OF PARTIES

In addition to the parties listed in the caption, the following were parties below:

Celebrity Cruises, Inc., and Fantasia Cruising, Inc.; Dorothy Cantone, individually and as Administratrix and Personal Representative of the Estate of Pasquale C. Cantone; Ronald and Sima Cesarski; Felice and Frances DeFrancesco; Frank and Rita Galante; Raymond W. and Mary Ruth Hague; Kevin L. Jenkins; Jane King; Clare Dillon; Louis B. and Mary Montes; Mary Purcell; Michael and Doris Sckipp; Sara Tofano; Richard and Carol Lorenzo; Paul and Phyllis Freeman; Josephine Monticciolo; Ralph Esposito; Anne Albino; Simone Dranov; Eva Rabinovich; Vincent and Myrna Viola; George and Margaret Stancati; William and Kathleen Buck; William Buck Jr.; Kimberly Buck; Perdita I. Spaar and William Spaar Jr.; Leslie Perlin and Barry Perlin, M.D.; John Bentzley; Suzanne Benzing, Executrix of the Estate of John J. Benzing; Amelia Benzing; Alexander and Linda Thomas.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner Essef Corporation is the parent corporation of Petitioners Pac-Fab, Inc., n.k.a. Pentair Pool Products, Inc., and Structural Europe N.V., n.k.a. Pentair Water Belgium, f.k.a. SFC. The parent corporation of Essef Corporation is Pentair, Inc. No publicly owned corporation owns more than 10% of any of Pentair, Inc.'s stock.

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RULE

Fed. R. App. P. 4(a)(5) 1

PETITION FOR WRIT OF CERTIORARI

Petitioners the Essef Corporation, Pac-Fab, Inc., and Structural Europe N.V. (collectively "Essef") respectfully request that this Court grant their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit below.

OPINIONS BELOW

The opinion of the court of appeals is published at 333 F.3d 355 (2d Cir. 2003) and appears in the Appendix of this Petition ("Pet. App.") at 1a-27a. The court of appeals' unpublished order denying the petition for rehearing *en banc* appears at Pet. App. 34a-35a. The unpublished order of the district court order on review is available at 2002 WL 1000949 (S.D.N.Y. May 15, 2002) and appears at Pet. App. 28a-33a.

JURISDICTION

The court of appeals entered judgment on June 25, 2003, and denied a timely petition for rehearing *en banc* on August 28, 2003. The court of appeals stayed its mandate provided this Petition is filed by October 14, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISION INVOLVED

The relevant provision of the Federal Rules of Appellate Procedure 4(a)(5) is reproduced at Pet. App. 36a-37a.[1]

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[1] Rule 4(a)(5) was amended in 2002, but that amendment is immaterial because it did not change the excusable neglect standard that is the subject of this petition. For the Court's convenience, Petitioners have attached both versions of Rule 4(a)(5). The prior version appears at Pet. App. 37a, and the current version appears at Pet. App. 36a.

STATEMENT OF THE CASE

This case presents a conflict with decisions of this Court and other courts of appeals on a critical element of federal judicial procedure: namely, the standard for "excusable neglect" this Court established in *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). That standard governs district court discretion to grant relief from filing deadlines under a number of federal rules and statutes. In *Pioneer*, this Court held that a trial court determining whether neglect is "excusable" must engage in an equitable balancing of "all relevant circumstances," including four specific factors: prejudice to other parties, the length of delay, the reason for delay, and the effect on judicial proceedings. *Id.* at 395.

In the decision below, the Second Circuit has held that a finding on a single *Pioneer* factor – the reason for the delay was an attorney's mistake of fact – extinguishes the district court's discretion to weigh *any* other relevant factors and find the attorney's neglect excusable despite the utter absence of prejudice, delay, or impact on judicial proceedings caused by his mistake. In short, the decision below fundamentally restructures the analysis this Court embraced in *Pioneer* by elevating the reason for the delay to dispositive status.

The court of appeals in the decision below thus immunized from appeal multimillion dollar judgments because of an inconsequential delay from an attorney's mistaken reliance on an opposing counsel's representation of the relevant deadline for appeals. The Second Circuit's self-described "hard line" position, Pet. App. 21a, directly contradicts this Court's "liberal understanding" of the excusable neglect standard, *Stutson* v. *United States*, 516 U.S. 193, 194 (1996) (per curiam). Indeed, in *Pioneer*, this Court specifically held that the movant seeking relief from a filing deadline need *not* make a preliminary showing that there was an adequate reason for the delay before a trial court undertakes equitably

to balance the prejudice to nonmovants, length of delay, or impact on judicial proceedings and any other relevant circumstances. 507 U.S. at 395 & nn.13-14. To the contrary, this Court held that good faith and the absence of prejudice or of effect on judicial proceedings "weigh strongly" in favor of finding excusable neglect. *Id.* at 398. The Second Circuit's elevation of the reason for delay as the dispositive factor is irreconcilable with the *Pioneer* framework, and is at odds with decisions of other courts of appeals that are faithful to *Pioneer*. This Court should grant review to resolve these conflicts of authority, as well as the inconsistency with this Court's own precedent.

Factual Background

This case arose from a 1994 outbreak of Legionnaires' Disease on board a ship operated by Celebrity Cruise Lines, Inc. and Fantasia Cruising, Inc. (hereinafter "Celebrity"). Plaintiffs alleged that a cause of the outbreak was a bacterial build-up in a whirlpool that was attributable to a defect in filters designed, manufactured, and distributed by petitioner Essef. Plaintiffs sued Essef and Celebrity, and Celebrity in turn cross-claimed against Essef for indemnification and other damages. Pet. App. 3a-4a.

Proceedings Below

Twenty-two separate actions were filed by the end of 1995 in the district court. The actions were consolidated, and the plaintiffs' claims (unless settled) were litigated by consent before a magistrate judge. The parties agreed to a "bellwether" procedure to expedite resolution of all the actions. Under that procedure, the claims of two plaintiffs – John and Joyce Silivanch – would be tried to a jury. The jury would determine each defendant's proportionate liability and Celebrity's right of indemnification against Essef. The *Silivanch* jury also would determine issues of causation of the Silivanches' injuries and their compensatory damages, and each defendant's liability for any punitive damages to all the

plaintiffs as a group. The *Silivanch* jury's findings on all issues would be binding in all of the remaining cases, except for proximate cause and compensatory damages; each plaintiff was entitled to a separate trial on those two issues. The court would allocate any punitive damages awarded in the bellwether trial among the various plaintiffs. Pet. App. 4a-5a.

In June 2000, the jury returned a verdict finding that the defendants were liable to the Silivanches and that Essef was obliged to indemnify Celebrity. A nonfinal judgment was issued on September 5, 2000 (and entered on the docket on September 6, 2000) awarding the Silivanches $3.6 million in compensatory damages and prejudgment interest. That judgment also awarded a total of $7 million in punitive damages against Essef ($4.2 million to all the plaintiffs, including the Silivanches, to be divided later, and $2.8 million to Celebrity). The remaining plaintiffs then settled or tried their cases on the issues of causation and compensatory damages. Pet. App. 5a. The total compensatory damages awarded against Essef to all plaintiffs and cross-plaintiffs exceeded $4.8 million.

On November 7, 2001, the magistrate judge, having allocated the punitive damages award among the plaintiffs, issued a supplemental judgment awarding over $2.2 million in punitive damages to the Silivanches. On November 19, 2001, the judge severed Celebrity's remaining claims against Essef, and pursuant to Federal Rule of Civil Procedure 54(b) directed the clerk to enter final judgment in the plaintiffs' cases that had been successfully tried to verdict.

Because certain supplemental judgments were not properly forwarded to counsel and did not include postjudgment interest, the magistrate judge issued a superseding order on December 7, 2001 reopening the cases. On January 25, 2002 the magistrate judge signed separate "Second Supplemental Judgments" awarding post-judgment interest to plaintiffs receiving punitive damages. On the same day, the judge

issued a new Rule 54(b) order severing Celebrity's claims against Essef, and directing the entry of final judgment in favor of the plaintiffs in each case. The Rule 54 order was not entered on the *Silivanch* docket; rather, the clerk entered only the Second Supplemental Judgment on postjudgment interest on January 28, 2002. Pet. App. 6a.

On February 19, 2002, Essef's lawyer participated in a pre-argument telephone conference with a staff attorney in the Second Circuit to discuss an earlier appeal filed by a different plaintiff. Staff counsel at the court of appeals wanted to set a briefing schedule in that appeal that would correspond to the schedule that would govern the appeals that Essef and other parties indicated they intended to file. At that conference, Celebrity's lawyer represented that March 4, 2002 was the final date for filing the *Silivanch* appeals. The Essef lawyer marked March 4, 2002 in his calendar as the last day for filing a notice of appeal. Pet. App. 7a.

Essef filed a notice of appeal on March 1, 2002, which its counsel believed based on the notation in his calendar was three days prior to the deadline. Once Essef's counsel realized that more than 30 days had passed between the date of entry of the Second Supplemental Judgment on January 28 and the filing of the notice of appeal on March 1, Essef filed a motion for an extension of time in which to file its notice of appeal on the grounds of excusable neglect. After discovering that the Rule 54(b) order had not been entered in the *Silivanch* docket, Essef further argued that no appealable judgment had yet been entered in *Silivanch*. Pet. App. 8a-9a.

The district court held that the judgment was appealable as of January 28, 2002, but also held that Essef's late filing was excusable neglect and exercised its discretion to grant Essef's motion for an extension of time. The district court noted that this court had held that "[e]xcusable neglect may 'encompass situations in which failure to comply with a filing deadline is attributable to negligence.'" Pet. App. 31a (quoting *Pioneer*, 507 U.S. at 394). Nonetheless, the district court held that "the

prejudice to Essef of denying its motion would be significant, since it would be denied the opportunity to appeal a multimillion dollar verdict," whereas plaintiffs would suffer no additional hardship from the two-day delay. *Id.* at 32a. The order granting an extension of time was granted on May 15, 2002, and Essef filed a second notice of appeal on May 22, 2002.

On motion of the appellees, the Second Circuit nonetheless dismissed Essef's appeals as untimely. The court of appeals acknowledged that there was no entry of the Rule 54(b) order in the docket making the original and first supplemental judgment final. Nonetheless, the Second Circuit held that the "Rule 54(b) order was effective when it was signed and mailed to the parties, on January 25, 2002," and that the 30-day appeal period "began on the 28th, when the Second Supplemental Judgment in that case was set forth on a separate document and entered on the docket, and the period ended thirty days later on February 27." Pet. App. 15a.

Turning to the issue of excusable neglect, the court of appeals acknowledged that in *Pioneer* this Court had established a more liberal understanding of the "excusable neglect" standard. Pet. App. 16a. *Pioneer* required an "'equitable'" determination of "'all relevant circumstances surrounding the party's omission,'" including "'[1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.'" *Id.* at 17a (alterations in original) (quoting *Pioneer*, 507 U.S. at 395). The court of appeals nonetheless held that because the first, second, and fourth factors generally favor the movant for an extension of time, the court of appeals would "focus[] on the third factor: 'the reason for the delay, including whether it was within the reasonable control of the movant.'" *Id.* at 17a-18a.

The court of appeals, relying on a prior circuit precedent, held that "where 'the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test.'" Pet. App. 18a. The court complained of "a regimen of uncertainty in which time limitations were not rigorously enforced," and stated that it takes a "hard line" on failures to make timely filings. *Id.* at 20a, 21a. The court of appeals refused to distinguish between mistakes of law in interpreting the rule, and mistakes of fact in applying the rule. *Id.* at 22a. The Second Circuit dismissed Essef counsel's erroneous reliance on another party attorney's calculation of the time period as a basis for excusable neglect because it was not an "exceptional" circumstance. *Id.* at 23a. Accordingly, the Second Circuit dismissed Essef's appeals.

Petitioners filed a petition for rehearing en banc, which the Second Circuit denied on August 28, 2003. Pet. App. 34a-35a. Shortly thereafter, Petitioners filed an application for a stay of the judgments below pending the filing of this petition for a writ of certiorari. The lower court granted that application on September 24, 2003, with instructions that the stay would automatically expire if this petition were not filed by the close of business on October 14, 2003.

REASONS FOR GRANTING THE PETITION

Review by this Court of the decision below is necessary to ensure the proper and uniform resolution of an important element of federal judicial procedure, *viz.*, the standard for excusable neglect. In an abrupt departure from precedents of numerous courts of appeals and of this Court, the Second Circuit held that a finding on a single *Pioneer* factor extinguishes a district court's discretion to weigh any other relevant factors. Its decision fundamentally restructures the "liberal" four-part balancing test this Court developed in *Pioneer*, and substitutes a restrictive and myopic focus on the reason for the delay. This approach forecloses a district

court's ability to engage in an equitable weighing of several factors. The Second Circuit's open disregard of this Court's rulings is a compelling ground, in and of itself, to justify review.

But a disregard for this Court's precedent is not all that justifies plenary review of the decision below. This case is an ideal vehicle for resolving three separate conflicts among the courts of appeals.

First, it squarely presents the controversy whether a court may elevate a single of the four *Pioneer* factors into a dispositive requirement, such that if it is not met a court is precluded from weighing the remaining factors or any other equitable consideration. On this question, the Second Circuit's decision deepens a mature split among the courts of appeals that this Court should resolve.

Second, the courts of appeals are in disagreement as to whether the third *Pioneer* factor – the reason for the delay – is the factor entitled to primary consideration, or whether the first and fourth *Pioneer* factors – prejudice to other parties and the efficient administration of justice – are the factors which merit the central focus. The Second Circuit's position that the reason for delay is dispositive conflicts with other courts of appeals which have held that the critical inquiries are prejudice to other parties and the efficient administration of justice.

Lastly, this case presents the additional conflict of what type of conduct of the responsible person is "excusable." The Second Circuit's holding that an attorney's good-faith "mistake of fact" in applying the rule is inexcusable stands in stark conflict with the position of both the Ninth and D.C. Circuits.

In sum, if left unreviewed, the decision below will eviscerate the equitable balancing test this Court announced in *Pioneer*, and deepen a split among the circuits surrounding the proper application of the factors enumerated in that case.

The Court should grant certiorari to make clear that a determination of excusable neglect requires an equitable balancing of several factors, and reject the Second Circuit's *per se* position which improperly restructures that analysis. Excusable neglect is a term of plain meaning, *Pioneer*, 507 U.S. at 388, that should not be the subject of conflicting standards in the federal courts. It simply is intolerable that some litigants' counsel will have their mistakes forgiven and their claims allowed to proceed while others will forfeit their rights, with the differences in outcomes purely the product of geography. Only this Court can ensure the uniformity that the federal rules were designed to achieve.

I. THIS COURT SHOULD CORRECT THE LOWER COURT'S FUNDAMENTAL RESTRUCTURING OF THE "EXCUSABLE NEGLECT" FRAMEWORK THIS COURT DEVELOPED IN *PIONEER*.

The Second Circuit's decision in this case directly conflicts with this Court's decision in *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). In that case, this Court held that rules that empower a court to forgive missed filing deadlines for "excusable neglect" permit courts, "where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Id.* at 388. If the missed deadline resulted from neglect, the determination of whether the neglect is "excusable" is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." This Court provided a framework with which to analyze such claims, including four specific factors: (1) prejudice to other parties; (2) length of delay; (3) reason for delay; and, (4) effect on judicial proceedings. *Id.* at 395.

Although the Second Circuit recited the *Pioneer* factors, it then proceeded to treat three of these as purely superfluous. The Second Circuit's holding that a single *Pioneer* factor would be dispositive – "'the reason for the delay, including

whether it was within the reasonable control of the movant,'" Pet. App. 17a – directly conflicts with *Pioneer*. This focus renders superfluous all other factors, and is irreconcilable with this Court's directive that district courts undertake an equitable balancing of "all relevant circumstances," "includ[ing]" all four *Pioneer* factors. 507 U.S. at 395.

Even more fundamentally, this Court expressly rejected the Second Circuit's position (favored by the dissent in *Pioneer*) that "the factors relevant to this inquiry extend no further than the movant's culpability and the reason for the delay," excluding any consideration of prejudice or impact on judicial proceedings. *Id.* at 395 n.13; see also *id.* at 395 n.14 (rejecting position of dissent that factors of prejudice or impact on judicial proceedings could be considered only after "a threshold determination that the movant is 'sufficiently blameless' in the delay"). The Second Circuit's rule – focusing only on the reason for delay, and disregarding good faith and lack of prejudice – is even more stringent than that of the *Pioneer* dissent.

Finally, the "hard line" the Second Circuit espouses where good faith, lack of prejudice, and impact on judicial proceedings are irrelevant to an "excusable neglect" determination, Pet. App. 21a, contradicts this Court's "liberal understanding" of that standard, *Stutson*, 516 U.S. at 194. There is no way to square the holding below with this Court's clear holding that "the lack of any prejudice to the [other party] or to the interests of efficient judicial administration, combined with the good faith of respondents and their counsel, *weigh strongly* in favor of permitting the tardy claim," *Pioneer*, 507 U.S. at 398 (emphasis added).[2]

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[2] This Court has noted that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect," *Pioneer*, 507 U.S. at 392, because parties are bound to discover the law. But here, there is no contention that Essef's lawyer acted inadvertently with regard to the existence of Federal Rule of Appellate Procedure 4, ignored the content of that rule, or mistakenly construed that

In sum, the decision below is flatly irreconcilable with governing case law. This Court should grant review in order to make clear that the analysis established in *Pioneer* requires the examination – and balancing – of several factors, and that the analysis cannot be truncated by bestowing dispositive status on a single factor.

II. THIS COURT SHOULD INTERVENE TO RESOLVE THE MULTIPLE AND MATURE SPLITS OF AUTHORITY CAUSED BY THE SECOND CIRCUIT'S DECISION.

The Second Circuit's ruling conflicts with the positions taken by a number of other circuits in three important respects. First, it is in conflict with those courts of appeals that have taken the position – faithful to *Pioneer* – that an equitable balancing of all relevant factors is required for a determination of "excusable neglect." Second, the position the decision below espouses – that the reason for delay is the dispositive factor – is in conflict with those circuits that accord primary weight to the first and fourth *Pioneer* factors, *viz.*, prejudice to the nonmovant and the efficient administration of justice. Lastly, the decision below departs from the decisions of other courts of appeals as to what type of conduct of the responsible person can be considered "excusable."

1. Unsurprisingly, the Second Circuit's ruling conflicts with a number of courts of appeals that are faithful to this Court's requirement that in assessing excusable neglect, district courts should undertake an equitable balancing of all relevant circumstances, including the four *Pioneer* factors.

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rule. By prohibiting a district court from finding excusable neglect when an attorney makes a mistake of fact in calculating the appeal period, Pet. App. 22a-23a, the Second Circuit has effectively rendered the "excusable neglect" standard of Rule 4 a nullity with no room to operate. Certainly, there is nothing in terms of culpability to distinguish a mistake of fact from any other type of neglect that might cause a notice of appeal to be untimely.

Indeed, the Second Circuit's position on this issue is in conflict with several other circuits which have expressly held that a district court must undertake a balancing of all *Pioneer* factors. These courts recognize that the standard established in *Pioneer* was "liberal" and elastic, and require a balancing of the equities.

In *Bateman* v. *United States Postal Service*, 231 F.3d 1220 (9th Cir. 2000), the Ninth Circuit reversed a district court's determination that an attorney's missed deadline did not constitute excusable neglect where that determination was based on an examination of only one factor. The district court had examined only the first of the *Pioneer* factors – the reason for the delay – and had neither considered nor addressed the remaining three. In reversing the lower court's determination, the Ninth Circuit held that whether an actor's conduct constitutes excusable neglect requires an equitable balancing of each of the four *Pioneer* factors, not simply a focus on one factor. See *id.* at 1224. Making a determination based on "just one of the *Pioneer* . . . considerations" amounted to a "fail[ure] to conduct the equitable analysis laid out in *Pioneer*." *Id.* In the Ninth Circuit's view, the district court's approach (which mirrors the approach of the Second Circuit) amounted to "omitting the correct legal standard altogether." See *id.*; *accord Briones* v. *Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997) (per curiam) (holding that the four *Pioneer* factors provide the framework to assess "excusable neglect").

Like the Ninth Circuit, the Third Circuit has adopted a position faithful to *Pioneer*'s directive – thus putting it, too, squarely in conflict with the Second Circuit. In *In re Orthopedic Bone Screw Products Liability Litigation*, 246 F.3d 315 (3d Cir. 2001), the Third Circuit reversed a district court's determination that the excusable neglect standard was not met where that determination was based on a sole *Pioneer* factor. Noting the "equitable nature" of the inquiry set forth in *Pioneer*, the Third Circuit held that the excusable neglect

analysis requires a careful balancing of all equitable factors, an "analysis [which] eschews any *per se* rule" based on a single factor. *Id.* at 322, 329.

Finally, the Fifth Circuit, too, takes the position, contrary to the Second Circuit, that a determination of excusable neglect depends on an analysis of each of the four *Pioneer* factors. See *In re Eagle Bus Mfg., Inc.*, 62 F.3d 730, 736-40 (5th Cir. 1995) (affirming lower court's determination of "excusable neglect" by reviewing facts of case against each of *Pioneer*'s four factors).

It is clear that if the district courts in the Ninth, Third or Fifth Circuits had done precisely what the Second Circuit did here, their judgments would have been reversed. Similarly, if the district court had been located in California, Pennsylvania or Texas, its decision to allow this appeal would have been affirmed. This Court should resolve this fundamental decisional conflict on an important doctrine of civil procedure in the federal courts.

2. The controversy among the courts of appeals as to whether a single *Pioneer* factor may be dispositive is not the only conflict this Court should intervene to resolve. The decision below deepens an additional, and equally direct, split of authority over which of the four *Pioneer* factors are entitled to the greatest weight in an excusable neglect analysis.

On one side of the legal divide are those courts of appeals that, in conflict with the Second Circuit's decision, place the most emphasis on prejudice to other parties and impact on judicial proceedings. For example, in *Cheney* v. *Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11th Cir. 1996), the Eleventh Circuit held the first and fourth *Pioneer* factors are the critical factors in any excusable neglect analysis. Although recognizing the remaining *Pioneer* factors could not be disregarded (unlike the Second Circuit below), the Eleventh Circuit held that prejudice and efficient judicial

administration were the *Pioneer* factors entitled to "primary importance." *Id.*; *accord In re Worldwide Web Sys., Inc.*, 328 F.3d 1291, 1297 (11th Cir. 2003) (absence of prejudice to nonmoving party and to interest of efficient judicial administration are factors entitled to primary importance).

Like the Eleventh Circuit, the Seventh Circuit – in conflict with the Second Circuit – has held that prejudice and the efficient administration of justice are the critical factors in an excusable neglect analysis. In *United States* v. *Brown*, 133 F.3d 993, 996 (7th Cir. 1998), for example, the Seventh Circuit observed that a district court must conduct an equitable balancing of all *Pioneer* factors. However, it went on to hold that among those factors, prejudice to the nonmovant and efficient judicial administration were entitled to "special consideration." *Id.* (citing *Pioneer*, 507 U.S. at 398). The Seventh Circuit's language in *Brown* reveals just how direct the conflict with the Second Circuit is: the Seventh Circuit made clear that the reason for delay was neither "the only . . . [nor] the most important" factor in determining equitable neglect. *Id.* at 997.

On the other side of the legal divide are those courts of appeals that, like the Second Circuit, hold that special weight should be accorded the reason-for-delay factor. For example, in *Lowry* v. *McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000), the Eighth Circuit explicitly held that of the four *Pioneer* factors, the reason for the delay must be accorded the greatest import. *Accord Gibbons* v. *United States*, 317 F.3d 852, 854 (8th Cir. 2003). Likewise, the First and Sixth Circuits have held that the reason for delay is the chief consideration. See *Graphic Communications Int'l Union, Local 12-N* v. *Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5 (1st Cir. 2001); *United States* v. *Thompson*, 82 F.3d 700, 702-03 (6th Cir. 1996).[3]

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[3] Even among those circuits that engage in a weighting of the *Pioneer* factors, each one – with the exception of the Second Circuit – nonetheless

These cases establish the existence of a widening split of authority over which factors recognized by this Court in *Pioneer* are entitled to the greatest weight in an excusable neglect analysis. The Second Circuit's position on this issue is directly and irreconcilably contrary to the position taken by other courts of appeals, and thus presents a proper vehicle for this Court to resolve this conflict.

3. There is an additional divide over what type of conduct is deemed "excusable" for purposes of the third *Pioneer* factor, *i.e.*, the reason-for-delay. The Second Circuit's holding, that an attorney's good-faith mistake of fact in applying a rule is *per se* inexcusable, conflicts with the rule in both the Ninth and D.C. Circuits.

The Ninth Circuit has squarely held that conduct *is* excusable if the reason for the delay suggests, as in the case of Essef's counsel, mere negligence or carelessness. In *Bateman*, the Ninth Circuit analyzed whether an attorney's reason for delay – that he left the country despite knowing a pleading would be due in his absence – was the type of conduct that could constitute excusable neglect. In finding that it was, the Ninth Circuit held that – in the absence of prejudice, substantial delay, and impact on judicial proceedings – negligent conduct that did not reflect "deviousness or willfulness" was encompassed in the spectrum of what type of conduct could be deemed "excusable." 231 F.3d at 1224-25.

Like the Ninth Circuit, the D.C. Circuit has held that a good-faith mistake is excusable for purposes of the third

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recognizes that a finding on what that circuit deems the key factor does not relieve a court of its obligation to balance the remaining factors. *See Lowry*, 211 F.3d at 463 (although reason-for-delay is factor entitled to most weight, a finding on that factor "is not a condition precedent to our obligation to consider the other equitable factors."); *Brown*, 133 F.3d at 996 (noting that prejudice and efficient judicial administration are key factors, but nonetheless balancing remaining *Pioneer* factors); *Cheney*, 71 F.3d at 850 (same).

Pioneer factor. In *Yesudian ex rel. United States* v. *Howard University*, 270 F.3d 969 (D.C. Cir. 2001), that court confronted whether an attorney who mistakenly relied on the local rules in lieu of the federal rules had committed excusable neglect. After extensively analyzing each *Pioneer* factor, the Court held that even an attorney's "[f]oolish" mistake can constitute "excusable" conduct. See *id.* at 971.

The D.C. Circuit recently had occasion to reiterate its position on this issue in *In re Vitamins Antitrust Class Actions*, 327 F.3d 1207 (D.C. Cir. 2003). In that case, it expressly declined to adopt a rule that "garden variety . . . inattention can never constitute excusable neglect." *Id.* at 1209. In so concluding, the D.C. Circuit observed that the framework this Court developed in *Pioneer* precluded the adoption of any such *per se* rule. According to the D.C. Circuit, "*Pioneer* purposely fashioned a flexible rule which, by its nature, counsels against the imposition of a *per se* rule on attorney neglect." *Id.* Only months later, the Second Circuit adopted the opposite position in this case.

In stark contrast to the position taken by the Ninth and D.C. Circuits, the Second Circuit has embraced its "hard line" position that certain types of neglect, including a mistake of fact in determining a deadline, cannot be excused even in the absence of delay, prejudice or impact on judicial proceedings. This Court should grant review of the decision below in order to provide guidance to the lower courts as to what type of conduct of the responsible person is excusable.

Given the prevalence of the "excusable neglect" standard in the federal rules and statutes governing judicial procedure, see *Pioneer*, 507 U.S. at 391-95, this Court has recognized that conflicts in the interpretation of that standard cannot be allowed to persist. *Id.* at 387. The decision below is irreconcilable with *Pioneer* and decisions of other circuits, and robs the district courts of the equitable discretion that this Court has stated is the hallmark of "excusable neglect"

determinations. *Id.* at 395. Accordingly, this Court's review is imperative.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 14, 2003

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket Nos. 02-7229, 02-7279, 02-7320, 02-7595, 02-7600, 02-7603, 02-7604, 02-7606, 02-7607.

JOHN AND JOYCE SILIVANCH, FELICE AND FRANCES DEFRANCESCO, RAYMOND AND MARY HAGUE, CAROL AND RICHARD LORENZO,
Plaintiffs-Appellees-Cross-Appellants,

DOROTHY CANTONE, KEVIN L. JENKINS, WILLIAM, KATHLEEN, WILLIAM JR., AND KIMBERLY BUCK, RONALD AND SIMA CESARSKI, MICHAEL AND DORIS SCKIPP, FRAN AND RITA GALANTE, MARY AND LOUIS B. MONTES, JANE KING, CLARE DILLON, AND MARY PURCELL,
Plaintiffs-Appellees,

v.

CELEBRITY CRUISES, INC., AND FANTASIA CRUISING, INC.,
Defendants-Cross-Appellants,

v.

ESSEF CORP., PAC-FAB, INC., AND STRUCTURAL EUROPE, N.V. (F/N/A SFC),*
Defendants-Appellants-Cross-Appellees.

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* Numerous other defendants, third-party-defendants, cross-defendants, cross-claimants, counter-claimants, and counter-defendants appear on this Court's many docket sheets for these appeals. We follow the convention of the district court and parties and refer only to those parties who have been actively represented with respect to the motion to dismiss the appeal that is the subject of this opinion. We also disregard what appear to have been several changes of name and structure among defendants that are apparently related to Essef Corp. and represented by its counsel.

Argued: Sept. 24, 2002.
Decided: June 25, 2003.

Before: FEINBERG and SACK, Circuit Judges, and MURTHA, District Judge.**

SACK, Circuit Judge.

Plaintiffs-Appellees-Cross-Appellants (the "plaintiffs") move to dismiss appeals filed by Defendants-Appellants-Cross-Appellees Essef Corporation, Pac-Fab, Inc., and Structural Europe, N.V. (collectively "Essef") and cross-appeals filed by Defendants-Cross-Appellants Celebrity Cruises, Inc., and Fantasia Cruising, Inc. (collectively "Celebrity") from a mass tort action heard in the United States District Court for the Southern District of New York. The plaintiffs contend that we lack jurisdiction to hear the appeals because Essef did not file a notice of appeal within thirty days after judgment was entered as required by Fed.R.App.P. 4(a)(1). Essef relies on an extension of the time to file granted by the district court (James C. Francis IV, *Magistrate Judge*) under Fed.R.App.P. 4(a)(5) after the court found that the neglect that resulted in Essef's tardiness was excusable. The plaintiffs argue that Essef's neglect was not excusable and that the district court abused its discretion in holding otherwise. For the reasons set forth below, we agree with the plaintiffs.

In addition, Essef contends that the judgments appealed from did not become final and the time to appeal did not begin to run until the district court entered its Fed.R.Civ.P. 54(b) order on the docket in *Silivanch,* the "bellwether" case, which it did not do until after we held argument with respect to these motions. Essef bases this contention on the fact that

** The Honorable J. Garvan Murtha, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

although an order under Fed.R.Civ.P. 54(b), which directed that the judgment from which appeal was being sought was final and therefore appealable, was signed by the magistrate judge on January 25, 2002, and mailed to the parties, there was not then an entry in the docket for the "bellwether" action reflecting the issuance of the order. We conclude that the Rule 54(b) order was effective when it was signed and issued, even though it was not then entered in the "bellwether" action docket.

We therefore dismiss the appeals and cross-appeals for want of appellate jurisdiction.

BACKGROUND

The action before us arose from a 1994 outbreak of Legionnaires' Disease on board Celebrity's cruise ship Horizon. The United States Centers for Disease Control and Prevention traced the outbreak to the presence of *legionella* bacteria in filters designed, manufactured, and distributed by Essef that were operated in connection with the ship's whirlpool spa. Water from the spa passed through silica sand and gravel within the filters, cleansing it of hair, dirt, and oils. Beneath the gravel, each filter contained a hub from which "laterals" radiated like the spokes of a wheel. Filtered water returned to the spa via holes in the laterals.

The filters were designed to be cleaned by running them in reverse. Water was forced through the laterals and up through the gravel and sand, dislodging built-up waste material. Waste water from this "backwashing" process was then thrown overboard.

According to the evidence adduced at trial, the filters did not backwash properly. Instead of lifting the entire sand bed and cleansing each grain, water flowed primarily through the center of each filter and failed to clean the outer edges. As waste material built up in the filters, "biofilms" of organic material formed. These biofilms trapped the *legionella* inside

the filters, protecting the bacteria from disinfectants while providing a growth medium. The bacteria proliferated. As water containing the bacteria was released back into the whirlpool, it was aerosolized and inhaled by passengers in and near the spa.

Many victims of the outbreak, their families, and their estates, including these plaintiffs, subsequently brought suit against Celebrity and Essef for their injuries and those of their relatives. Celebrity, in turn, filed cross-claims against Essef for indemnification and other damages.

By the end of 1995, at least twenty-two separate such actions had been filed. All of the related cases were assigned to United States District Judge Lawrence M. McKenna in the United States District Court for the Southern District of New York. Judge McKenna ordered the cases consolidated for discovery before Magistrate Judge Francis who, with the consent of the parties pursuant to 28 U.S.C. § 636(c), was later designated to conduct all proceedings in the matter, including the entry of final judgments. Over the next several years, discovery proceeded. During that period, some of the plaintiffs settled with Celebrity and Essef.

In May 2000, the remaining plaintiffs, Celebrity, and Essef agreed to resolve the entire matter before Magistrate Judge Francis using a "bellwether" procedure. One case—the "bellwether"—brought by John and Joyce Silivanch, would be tried to a jury on all issues. The jury would determine if Celebrity, Essef, or both were liable for the Silivanches' injuries. If the jury found such liability, it would determine each defendant's proportional liability and Celebrity's right of indemnification against Essef, if any, with regard thereto, in addition to the amount of the Silivanches' compensatory damages. It would also determine each defendant's liability for any punitive damages to all the plaintiffs as a group. The *Silivanch* jury's findings on all issues, other than proximate cause with respect to the Silivanches' injury and com-

pensatory damages to be awarded to them, would be binding in all of the remaining cases, each of which would be tried separately on the reserved two issues. Any punitive damages awarded in the bellwether trial would be allocated by the court among the various plaintiffs.

In June 2000, the jury returned a verdict finding the defendants liable to the Silivanches. It also found that Essef had an obligation to indemnify Celebrity in full. The jury awarded $4,200,000 in punitive damages to the plaintiffs, and another $2,800,000 to Celebrity, all to be paid by Essef.

The remaining plaintiffs then settled or tried their cases on the issues of causation and compensatory damages. Afterward, the district court apportioned the punitive damages award among those plaintiffs who had established the requisite proximate causation at trial, or against whom such causation had not been contested because of definitive medical evidence.

In November 2001, the district court severed Celebrity's remaining claims against Essef, and, pursuant to Fed.R.Civ.P. 54(b),[1] directed the clerk of the court to enter final judgment

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[1] Rule 54(b) reads in its entirety:

> *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed.R.Civ.P. 54(b).

in, and close, some or all of the plaintiffs' cases. Supplemental judgments as to punitive damages were signed by the magistrate judge, issued, and docketed for each plaintiff who was awarded punitive damages.

Shortly thereafter, on December 7, 2001, however, the district court ordered the clerk to reopen the cases that had been closed because the supplemental judgments "in many of the related cases . . . ha[d] not been forwarded to counsel, and certain parties ha[d] raised the issue of post-judgment interest." Order dated Dec. 7, 2001.

On January 25, 2002, after ruling on post-judgment interest, the magistrate judge signed a new Rule 54(b) order severing Celebrity's claims against Essef, and directing the entry of final judgment in favor of the plaintiff or plaintiffs in each case. The orders, highly similar although individualized for each set of parties, were mailed to counsel and entered on each docket except, inexplicably, the docket for *Silivanch.*

Also on January 25, 2002, the magistrate judge signed separate "Second Supplemental Judgments" ordering post-judgment interest for each plaintiff or group of plaintiffs that had been allocated punitive damages. Additionally, the Second Supplemental Judgments alluded to Rule 54(b) and recited the prior compensatory awards, prejudgment interest, and punitive damages awards for each plaintiff. They were docketed in each case shortly thereafter. The *Silivanch* docket contains a January 28 entry that refers to the judgment signed on January 25:

> SECOND SUPPLEMENTAL JUDGMENT # 00,1990: that there being no just reason for delay, purs. to FRCP 54(b), pltffs be awarded postjudgment interest on the principal amount of $5,892,719.80 from 9/6/00, until final payment is made, at the rate of 6.241 percent, compounded annually. (signed by Magistrate Judge

> James C. Francis IV); Mailed copies and notice of right to appeal. Entered on Docket: 1/28/02. (kg) [Entry date 01/28/02].

(brackets in original.) As noted on the docket, the judgments were mailed to counsel along with "right to appeal" notices.

On February 5, 2002, Robert A. Jacobs, the Silivanches' lawyer, wrote to Essef's lawyer, Robin G. Weaver, raising the issue of Essef's appeal bond. Jacobs' letter mentioned that "final judgment" had been entered on January 28. Weaver responded on February 8, acknowledging receipt of Jacobs' letter. The two lawyers had conversations in which, according to Jacobs, Weaver acknowledged that judgment had been entered on January 28.

On February 19, some three weeks after the Second Supplemental Judgments had been entered, counsel for Celebrity (James M. Hazen), Essef (Weaver), and the Lorenzo, Hague, and DeFrancesco plaintiffs (Brendan Burke), conducted a pre-argument telephone conference with Second Circuit staff counsel regarding a separate appeal filed by the Lorenzos. During the conference, staff counsel sought to set a briefing schedule that would take into account the timing of Essef's expected appeals in the other cases, and asked the lawyers when they would know whether they were pursuing such other appeals. According to Hazen, he "posited" March 4, 2002, as the "control date" for the *Silivanch* appeals, but had not actually calculated the deadline himself because Celebrity intended to appeal only if Essef did. Hazen Decl. dated Apr. 15, 2002, at ¶ 6. Based on Hazen's statement, Essef lawyer Weaver noted March 4 in his calendar as the last day for filing a notice of appeal.

Fed.R.App.P. 4(a)(1)(A) requires parties to file notices of appeal "within 30 days after the judgment or order appealed from is entered." Under it, Essef's time to appeal expired on February 27, 2002, thirty days after the January 28 entries of

the Second Supplemental Judgments. On March 1, thirty-*two* days after those judgments had been entered, Essef filed a notice of appeal under the *Silivanch* caption and master-file docket number listing a January 28, 2002, order as the latest judgment appealed from.

On March 29, 2002, Essef's counsel having realized that more than thirty days had passed between the entry of the Second Supplemental Judgment in *Silivanch* and the filing of the notice of appeal, Essef filed a motion in the district court requesting, *inter alia,* an extension of time to file a notice of appeal pursuant to Fed. R.App. P. 4(a)(5).[2] In its motion, Essef asserted that it had filed its notice of appeal late because its counsel had been misled by Hazen's statement that the deadline was March 4, and that counsel's mistake "persisted because Essef received no written notice from the Court or any party that judgment was in fact entered on January 28, 2002." Essef Mot. to Reopen the Time in Which to File a Notice of Appeal dated Apr. 3, 2002, at 2. Shortly thereafter, Essef raised its contention that the time for filing a

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[2] Fed.R.App.P. 4(a)(5) reads in pertinent part:

> *Motion for Extension of Time*
>
> (A) The district court may extend the time to file a notice of appeal if:
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> . . . .
>
> (ii) . . . [a] party shows excusable neglect or good cause.
>
> (B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.
>
> (C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(emphasis in original).

notice of appeal had not yet begun to run because the second Rule 54(b) order had never been entered in the *Silivanch* docket despite the fact that *Silivanch* was the bellwether case.

On May 8, 2002, the district court heard oral argument on Essef's motions. At the hearing, Essef abandoned its argument that it had never received notice of the Second Supplemental Judgments. It argued instead that no appealable judgment had been entered, and pressed its claim of "excusable neglect based on . . . the state of the docket, the confusion," and Hazen's statement that the deadline was March 4. Tr. of May 8, 2002, Hearing, at 29.

The district court granted Essef's motion, concluding that Essef's late filing in reliance on Hazen's statement constituted "excusable neglect" under Fed.R.App.P. 4(a)(5)(A)(ii). *In re: Horizon Cruises Litigation,* Nos. 94 Civ. 5270; 94 Civ. 6147; 95 Civ. 0374, slip op. (S.D.N.Y. May 15, 2002) ("*Horizon Cruises Litigation*"). The court rejected Essef's argument that an appealable judgment had not yet been entered, however, describing this argument as "an after-the-fact rationalization that is inconsistent with the record and with the contemporaneous understanding of all the parties." *Id.* at 6 n. 3.

Essef filed a new notice of appeal on May 22, 2002, under the *Silivanch* caption and docket number listing the other plaintiffs' cases as related and also being appealed, and filed initial notices of appeal in those other cases too. Celebrity filed cross-appeals shortly thereafter. The plaintiffs then filed these motions to dismiss the appeals and cross-appeals as untimely.

On September 25, 2002, one day after these motions were argued before us, the clerk of the district court entered the January 25 Rule 54(b) order in the *Silivanch* docket. Essef then filed a third notice of appeal virtually identical to its second.

Before us, then, are the plaintiffs' motions to dismiss the appeals and cross-appeals on the ground that the district court abused its discretion by granting the Rule 4(a)(5) motion for an extension of time. We conclude that it did, and therefore dismiss the appeals and cross-appeals.

DISCUSSION

I. Standard of Review

"A district court's order granting or denying motions under Fed.R.App.P. 4(a)(5) is reviewed for abuse of discretion." *Goode v. Winkler*, 252 F.3d 242, 245 (2d Cir.2001) (per curiam). Such an order "cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion that it reached upon a weighing of the relevant factors." *In re O.P.M. Leasing Servs., Inc.*, 769 F.2d 911, 915 (2d Cir.1985) (citation and internal quotation marks omitted).

II. Legal Landscape

Essef bases its opposition to the motions to dismiss its appeal on two primary contentions. It asserts that no order is effective until it is docketed, and therefore its notice of appeal was timely because it was filed before the district court's Rule 54(b) order was entered in the *Silivanch* docket. It also defends the district court's finding that Essef's neglect—i.e., Essef's counsel's reliance on a statement made by opposing counsel that the deadline was March 4, 2002, instead of calculating the deadline himself—was "excusable" under Rule 4(a)(5).

Ordinarily, only the final judgment of a district court is appealable. 28 U.S.C. § 1291; *but cf. id.* § 1292 (granting appellate jurisdiction over certain provisional equitable remedies and controlling questions of law certified by district courts). Under Rule 54(b), an order or judgment that resolves some but not all of the claims of all of the parties does "not

terminate the action as to any of the claims or parties," Fed.R.Civ.P. 54(b), and is therefore not final and immediately appealable. When multiple claims are involved and one or more of them have been resolved, however, a district court may "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties" if the court finds that there is "no just reason for delay," *id.*, at which time the judgment or judgments become appealable.

According to the rules in effect during the district court proceedings, every judgment, whether or not pursuant to a Rule 54(b) certification, was "effective only when ... set forth [on a separate document] and when entered as provided in Rule 79(a)." Fed.R.Civ.P. 58 (as in effect until December 1, 2002);[3] *Cooper v. Town of East Hampton*, 83 F.3d 31, 34 (2d Cir.1996) ("Th[is] mechanistic requirement[ ], while seemingly trivial, [is] necessary to the goal of promoting clarity. Litigants must be able to determine when a judgment is a judgment for the purpose of appeal . . . ."). The "separate document" mandated by Rule 58 must be "separate from any judicial memorandum or opinion" and "must be labeled a 'judgment.'" *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 84 (2d Cir.1993). And Fed.R.Civ.P. 79(a) requires the clerk of the court to enter every order or judgment in a case into that case's docket.

A party seeking to appeal a civil judgment must (with exceptions not applicable here) file a notice of appeal with the district court clerk, Fed.R.App.P. 3(a)(1), "within 30 days after the judgment or order appealed from is entered," *id.* 4(a)(1)(B); *see Endicott Johnson Corp. v. Liberty Mut. Ins.*

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[3] Rule 58 was substantially revised by amendments effective December 1, 2002. Among other things, the new Rule 58 clarifies when a separate judgment is unnecessary. Fed.R.Civ.P. 58(a)(1) (as amended, December 1, 2002). If a judgment does require a separate document, the judgment is deemed entered 150 days after it is entered in the docket, even if no separate document has been issued. *Id.* 58(b)(2).

Co., 116 F.3d 53, 55 (2d Cir.1997). The thirty-day period does not begin to run until a judgment is issued on a separate document and entered in the docket, Fed.R.App.P. 4(a)(7) (as in effect until December 1, 2002),[4] and the judgment is or becomes final, *see FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 275-76, 111 S.Ct. 648, 112 L.Ed.2d 743 (1991) (holding that a notice of appeal filed before any appealable judgment has been entered becomes effective when an entered judgment becomes appealable).

Compliance with Rule 4(a) is "mandatory and jurisdictional." *Endicott Johnson Corp.*, 116 F.3d at 55 (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (per curiam) (citation and internal quotation marks omitted)). If no notice of appeal is filed before the deadline provided by Rule 4(a)(1) (or a new deadline set pursuant to Rule 4(a)(5) or (6)), this Court lacks jurisdiction to hear the appeal. *See Griggs*, 459 U.S. at 61, 103 S.Ct. 400 (finding that a notice of appeal filed outside the time limits prescribed by Rule 4(a) is a "nullity," and that a timely notice of appeal is jurisdictional).

"The power of the federal courts to extend this time limitation is severely circumscribed." *Endicott Johnson Corp.*, 116 F.3d at 56. In most civil cases, there are only two potential methods for doing so. Fed.R.App.P. 4(a)(6) allows district courts to "reopen the time to file an appeal" if a party did not receive notice that judgment had been entered. And Fed.R.App.P. 4(a)(5) allows the district court to "extend the time to file a notice of appeal" if a party "shows excusable neglect or good cause."

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[4] Rule 4(a)(7) was amended in 2002 to follow the simultaneous amendments to Rule 58. *See supra* note 3. Under the amended rule, a judgment becomes final and the thirty-day period begins when it is docketed and issued in a separate document, or 150 days after the judgment is entered, even if it has not been issued in a separate document.

Under Rule 4(a)(1), the time in which to file an appeal does not begin to run until all of the requirements of Fed.R.Civ.P. 58 have been satisfied. Fed.R.App.P. 4(a)(1)(A) ("the notice of appeal . . . must be filed . . . within 30 days after the judgment or order appealed from is entered"); *id.* 4(a)(7) (as in effect until December 1, 2002) (defining "entry" as compliance "with Rules 58 and 79(a)" of the Federal Rules of Civil Procedure). Prior to the 2002 amendments to the federal rules, the Rule 4(a)(1) period in which to file a notice of appeal therefore did not begin to run until a Rule 58 judgment was issued on a separate document and entered on the docket and, if any claims in the case remained unresolved, was certified as final pursuant to Rule 54(b). *See generally* Michael Zachary, *Rules 58 and 79(a) of the Federal Rules of Civil Procedure: Appellate Jurisdiction and the Separate Judgment and Docket Entry Requirements,* 40 N.Y.L. Sch. L.Rev. 409 (1996).

The interplay of these rules provides the basis for Essef's two contentions in response to this motion: (1) that the judgment in *Silivanch* did not become final or appealable until the Rule 54(b) order was entered into the docket for that case because under Rule 79(a) orders do not become effective until they are docketed, and (2) that its neglect in failing to file a notice of appeal within thirty days of the entry of the Second Supplemental Judgment in *Silivanch* is excusable under Rule 4(a)(5).

III. Failure to Docket the Rule 54(b) Order in *Silivanch*

Essef asserts that no order is effective until it is entered in the docket, and that the Rule 54(b) certification in *Silivanch* therefore did not become effective, the Second Supplemental Judgments did not become appealable, and the time to appeal under Rule 4(a)(1) did not start to run, until the certification was docketed in *Silivanch* on September 25, 2002.

It is undisputed that the judgment from which Essef sought to appeal—the Second Supplemental Judgment in *Silivanch*—was set forth in a separate document, and entered on the docket on January 28, 2002. The only other requirement to start the time for filing of the notice of appeal running was the Rule 54(b) certification, which rendered the Second Supplemental Judgment final and therefore appealable. Essef argues that Rule 54(b) certifications, like Rule 58 judgments, are not effective until they are entered in the docket and points out that the Rule 54(b) certification in *Silivanch* was not *docketed* until much later. That is of no moment. There is no requirement that such a certification be docketed in order for it to become effective for these purposes. With respect to such certifications, the rules require only that a court make certain "express determination[s]" and "direct the entry of a final judgment." Fed.R.Civ.P. 54(b). To become effective, certifications—unlike final judgments—do not require entry in the docket.

Fed.R.Civ.P. 79(a) indeed does call for the entry of all "orders, verdicts, and judgments" in the docket, but the reason for the requirement is the docket's "public record keeping function." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 n. 4, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978) (per curiam) ("[u]nlike the separate-document requirement . . . the keeping of a civil docket pursuant to Rule 79 fulfills a public recordkeeping function"). The rule is directed to the clerk, not to the parties or the court. *See* Fed.R.Civ.P. 79(a).

In *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898 (2d Cir.1997), we rejected the idea that an undocketed order was a nullity despite a local rule stating that "notation in the appropriate docket . . . shall constitute the entry of the order." *Id.* at 909-10 (quoting S.D.N.Y. Civ. R. 6(a)). As we said in *Lightfoot*, the requirement that orders be entered in the docket is no more than "a ministerial rule of procedure, intended to

ensure that case dockets are properly maintained as useful sources of information for the litigants and court personnel." *Id.* at 910.[5]

The *Silivanch* Rule 54(b) order was effective when it was signed and mailed to the parties, on January 25, 2002. The Rule 4(a)(1) period began on the 28th, when the Second Supplemental Judgment in that case was set forth on a separate document and entered on the docket, and the period ended thirty days later on February 27. Because Essef's notice of appeal was not filed until two days thereafter, it was untimely and we lack jurisdiction to hear Essef's appeal unless Essef satisfactorily took advantage of one of the exceptions provided by Rule 4(a).

IV. Excusable Neglect

The district court decided that Essef's neglect in failing to file a timely notice of appeal was excusable under Fed. R.App.P. 4(a)(5) because of Essef's counsel's reliance on

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[5] Other courts have treated the significance of docket entries similarly. *See, e.g., Noli v. Commissioner*, 860 F.2d 1521, 1525 (9th Cir.1988) (holding an oral order binding and effective despite the court's failure to enter it on the docket); *In re Saunders,* 240 B.R. 636, 644 (S.D.Fla.1999) ("[p]arties should be able to reasonably rely on a written order, signed by a Judge, that the party has actually received, even if this Order does not get docketed"); *see also United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 235-36, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958) ("a formal judgment . . . signed by the judge . . . is prima facie the decision or judgment rather than a statement in an opinion or a docket entry.") (quoting *United States v. Hark*, 320 U.S. 531, 534-35, 64 S.Ct. 359, 88 L.Ed. 290 (1944)); Zachary, *supra*, at 434-40, 442-50 (concluding that the docket entry requirement is not jurisdictional with respect to judgments).

In *In re American Precision Vibrator Co.*, 863 F.2d 428, 429 (5th Cir.1989), the court did note that "[o]rders do not become final until they are docketed," but as Judge Kaplan pointed out in *In re Rezulin Products Liability Litigation*, 133 F.Supp.2d 272, 298 (S.D.N.Y.2001), *American Precision Vibrator* "is distinguishable because the dismissal order [in that case] was appealable and therefore governed by Rule 58."

Celebrity's counsel's statement during a pre-argument scheduling conference that the deadline for filing was March 4. Essef also argued that it was excusable because the lateness also resulted from confusion in the records and dockets of these cases.

We have observed:

> Prior to the Supreme Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), we adhered to a firm rule that the excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules. . . .
>
> In *Pioneer*, however, the Supreme Court established a more liberal standard for determining whether there had been 'excusable neglect.' Although *Pioneer* interpreted "excusable neglect" in the context of Bankruptcy Rule 9006(b)(1), the Court analyzed that term as it is used in a variety of federal rules, including Rule 60(b)(1). For that reason, we have held that *Pioneer's* "more liberal" definition of excusable neglect is applicable beyond the bankruptcy context where it arose.

Canfield v. Van Atta Buick/GMC Truck Inc., 127 F.3d 248, 249-50 (2d Cir.1997) (per curiam), *cert. denied*, 522 U.S. 1117, 118 S.Ct. 1055, 140 L.Ed.2d 117 (1998) (quoting *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir.1994) (other citations and internal quotation marks omitted)), *cert. denied*, 522 U.S. 1117, 118 S.Ct. 1055, 140 L.Ed.2d 117 (1998); *see also United States v. Hooper*, 9 F.3d 257, 259 (2d Cir.1993) (applying *Pioneer* to extensions of time to file notices of appeal under Fed.R.App.P. 4(b), noting that the case "draws upon the use of ['excusable

neglect'] in other federal rules," and "nothing . . . limits its interpretation . . . to the Bankruptcy Rules").[6]

In *Pioneer,* the Supreme Court referred to "excusable neglect" as an "elastic concept," 507 U.S. at 392, 113 S.Ct. 1489 (internal quotation marks omitted), implying a determination that is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission," *id.* at 395, 113 S.Ct. 1489. Factors to be considered in evaluating excusable neglect include "[1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." *Id.*

In the typical case, the first two *Pioneer* factors will favor the moving party: "[D]elay always will be minimal in actual if not relative terms, and the prejudice to the non-movant will often be negligible, since the Rule requires a 4(a)(5) motion to be filed within thirty days of the last day for filing a timely notice of appeal." *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir.), *cert. denied*, 531 U.S. 929, 121 S.Ct. 309, 148 L.Ed.2d 248 (2000). And rarely in the decided cases is the absence of good faith at issue. *See id.* But despite the flexibility of "excusable neglect" and the existence of the four-factor test in which three of the factors usually weigh in favor of the party seeking the extension, we and other circuits have focused on the third factor: "the reason for the delay, including whether it was within the

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[6] The term "excusable neglect" appears frequently in the United States Code and Federal Rules as a basis for motions to extend time limitations. *See, e.g.*, 2 U.S.C. § 394(c)(2); 28 U.S.C. § 2107(c); Fed. R. Bkrtcy. P. 7013, 8002(c)(2) & 9033(c); Fed.R.Crim.P. 45(b)(1)(B); Fed.R.Civ.P. 6(b)(2), 13(f) & 60(b)(1).

reasonable control of the movant."[7] *Pioneer*, 507 U.S. at 395, 113 S.Ct. 1489. We have noted that the equities will rarely if ever favor a party who "fail[s] to follow the clear dictates of a court rule" and held that where "the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test." *Canfield*, 127 F.3d at 250-51 (holding not clearly erroneous the district court's decision that a lawyer's failure to file motion papers within the time limit established by a local rule was not excusable neglect under Rule 60(b)); *accord United States v. Hooper*, 43 F.3d 26, 28-29 (2d Cir.1994) (per curiam) ("*Hooper II*") (affirming denial of Rule 4(b) extension where delay resulted from legal assistant's ignorance of the rules); *Weinstock*, 16 F.3d at 503 (affirming denial of Rule 4(a)(5) extension where delay was due to a misunderstanding of the rules, even though the rule in question was "a 'trap' for the unsuspecting litigant" and had been amended for that reason prior to our decision).

A. The Statement During the Scheduling Conference That the Deadline Was March 4

Although the last day for Essef's filing of its notice of appeal was February 27, thirty days after the entry of the Second Supplemental Judgment in *Silivanch*, Essef filed its notice of appeal on March 1, 2002. The district court found that "[d]uring [the scheduling] conference [with respect to the *Lorenzo* appeal], counsel for Celebrity stated that the deadline

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[7] *See also Graphic Communications Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5-6 (1st Cir.2001) ("Although the *Pioneer* standard is more forgiving than the standard in our prior case law, there still must be a satisfactory explanation for the late filing. . . . [T]he four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import. While prejudice, length of delay, and good faith might have more relevance in a close[ ] case, the reason-for-delay factor will always be critical to the inquiry.") (citation, internal quotation marks and final ellipsis omitted).

for appealing from the Second Supplemental Judgment was March 4, 2002. In reliance on that erroneous calculation, Essef did not file its notice of appeal until March 1, which was beyond the deadline." *Horizon Cruises Litigation*, slip op. at 1 (citations to the record omitted). We have no basis on which to conclude that those findings were erroneous, let alone clearly so.

The district court concluded that Essef's late filing therefore resulted from "excusable neglect" under Rule 4(a)(5). Here we disagree. We think that the court exceeded its discretion in so concluding. In our view, a lawyer's dependence entirely on a statement made under such circumstances in determining the filing deadline for a notice of appeal is not "excusable" as we have used that word in related contexts.

As already noted, we agree with the observation that, in the case of a motion for an extension of the time to file a notice of appeal, "the prejudice to the non-movant will often be negligible." *Lowry*, 211 F.3d at 463. We see no reason to doubt that that is true with respect to the prejudice to the plaintiffs in this case. We therefore agree with the starting point of the district court's analysis:

> [W]hen a party files for an extension of the time to file an appeal, "the court's sympathy will lie with the applicant: the hardship of being denied an appeal is great . . . , while the hardship to the prospective appellee is usually small." . . . [T]he prejudice to Essef of denying its motion [for an extension] would be significant, since it would be denied the opportunity to appeal a multimillion dollar verdict.

Horizon Cruises Litigation, slip op. at 5 (quoting *O.P.M. Leasing Servs., Inc.*, 769 F.2d at 916-17) (additional citation omitted).

We operate in an environment, however, in which substantial rights may be, and often are, forfeited if they are not asserted within time limits established by law. Judges, of course, make mistakes. We, like the district court, have considerable sympathy for those who, through mistakes—counsel's inadvertence or their own—lose substantial rights in that way.[8] And there is, indeed, an institutionalized but limited flexibility at the margin with respect to rights lost because they have been slept on.[9] But the legal system would groan under the weight of a regimen of uncertainty in which time limitations were not rigorously enforced—where every

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[8] Judge Learned Hand said of statutes of limitations:

> They are often engines of injustice; their justification lies in furnishing an easy and certain method of solving problems which are often intrinsically insoluble, or soluble only with so much uncertainty and after so much trouble that in the long run the game is not worth the candle. Perhaps they are not justifiable at all . . . . But where they do exist one must be prepared for hard cases, and it is no answer that this is one.

Helvering v. Schine Chain Theaters, 121 F.2d 948, 950 (2d Cir.1941).

[9] In addition to the shelter from the consequences of "excusable neglect" resulting in late appeals provided by Fed.R.App.P. 4(a)(5), and causing certain other procedural errors under Fed.R.Civ.P. 60(b), other obvious examples include the tolling in "extraordinary or exceptional circumstances" of the one-year period of limitations governing habeas corpus petitions under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214, *see, e.g., Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir.2000) (citation and internal quotation marks omitted), and the tolling of other statutes of limitations in other civil cases, *see, e.g., Pearl v. City of Long Beach*, 296 F.3d 76, 85 (2d Cir.2002) ("[W]e have broadly stated . . . that we will apply the equitable tolling doctrine as a matter of fairness where a plaintiff has been prevented *in some extraordinary way* from exercising his rights, [but] we [have] made it clear that we had in mind a situation where a plaintiff could show that it would have been *impossible* for a reasonably prudent person to learn about his or her cause of action") (citations and internal quotation marks omitted; first emphasis added; second emphasis in original), *cert. denied*, ___ U.S. ___, 123 S.Ct. 1574, 155 L.Ed.2d 313 (2003).

missed deadline was the occasion for the embarkation on extensive trial and appellate litigation to determine the equities of enforcing the bar.

In our cases addressing when neglect is "excusable," we have therefore taken a hard line. In *Canfield*, for example, we affirmed the denial of a motion to extend the time for responding to an adversary's dispositive motion when the attorney filed late, in violation of "the clear dictates of a court rule," because of his personal involvement in other affairs. *Canfield*, 127 F.3d at 250. The mere "possibility that a court may properly find excusable neglect [where it consists of inadvertence, ignorance of the rules, or mistakes construing the rules does not] alter[ ] the principle that failure to follow the clear dictates of a court rule will generally not constitute such excusable neglect." *Id.* at 250.

Similarly, in *Weinstock*, we agreed that the district court did not err when it declined to grant a motion to extend the plaintiff's time to appeal, even though the untimeliness resulted from the nullification by operation of law of a previously filed notice of appeal, *Weinstock*, 16 F.3d at 502, and even though the rule under which it had been nullified had since been amended precisely because it thus "created a 'trap' for the unsuspecting litigant," *id.* at 503; *see also* Fed. R.App.P. 4 advisory committee's notes (1993 amendment) (explaining rule change).[10] We affirmed because "[t]he excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language

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[10] *See also Weinstock*, 16 F.3d at 503 (referring to *McCowan v. Sears, Roebuck & Co.*, 908 F.2d 1099, 1103 (2d Cir.), *cert. denied*, 498 U.S. 897, 111 S.Ct. 250, 112 L.Ed.2d 209 (1990), in which we observed that "Judge Posner has appropriately termed Rule 4(a) [as then in effect] a 'trap for the unwary into which many appellants, especially those not represented by counsel . . . have fallen, with dire consequences since there is no way they can reinstate their appeal if the second notice of appeal is untimely.' *Averhart v. Arrendondo*, 773 F.2d 919, 920 (7th Cir.1985).").

of the federal rules." *Weinstock*, 16 F.3d at 503 (quoting *In re Cosmopolitan Aviation Corp.*, 763 F.2d 507, 515 (2d Cir.), *cert. denied*, 474 U.S. 1032, 106 S.Ct. 593, 88 L.Ed.2d 573 (1985)) (internal quotation marks omitted).

And in *Hooper II*, a criminal case nonetheless bearing a strong resemblance to the case before us, we agreed with the district court's refusal to order an extension of time to file a notice of appeal under Rule 4(b) where the failure to file a timely notice resulted from a legal assistant's confusion between the length of time after judgment in which a notice of criminal appeal must be filed and the length of time after judgment in which a civil appeal must be filed. (The appeal would have been timely had the case been civil rather than criminal.) We quoted *Weinstock*'s observation that "[a]s this Court has explained numerous times: The excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules. . . . Counsel's lack of familiarity with federal procedure is not an acceptable excuse." *Hooper II*, 43 F.3d at 29 (quoting *Weinstock,* 16 F.3d at 503 (internal quotation marks omitted in original)).

One might attempt to distinguish our decided cases from the one before us on the ground that they involved mistakes of law and this appeal is about a mistake of fact—when the thirty-day period in which to file a notice to appeal expired. *See Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 999 (11th Cir.1997) (making such a distinction). But we think that in this case, at least, it is a distinction that is difficult to sustain and of little value. In *Canfield*, for example, the defaulting lawyer had been specifically reminded of the time limitation that he ultimately missed. He simply failed to abide by it. 127 F.3d at 249. The neglect held not to be excusable therefore did not appear to result in a mistake of law. In any event, we see no reason to consider similarly neglectful conduct differently when it results in a

mistake of law rather than a mistake of fact. We find no justification for treating this case differently from *Hooper II*, for example, simply because in that case a legal assistant mistakenly thought that the rule called for a thirty rather than a ten-day limitation, whereas here, counsel knew there was a thirty-day limitation, but neglected to consult a calendar to determine when it expired. 43 F.3d at 28; *see also Lowry*, 211 F.3d at 463-64 (holding that the district court abused its discretion by concluding that one-day-late filing of notice of appeal resulting from counsel's miscalculation of the date on which notice of appeal was due was "excusable neglect" for purposes of applying Rule 4(a)(5)); *cf. Pioneer*, 507 U.S. at 392, 113 S.Ct. 1489 ("*inadvertence*, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect") (emphasis added); *Graphic Communications Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 8 (1st Cir.2001) (affirming denial by district court of Rule 4(a)(5) extension because lateness "was the result of ignorance of the law *and inattention to detail*") (quoting the district court order under review, emphasis added). We find nothing exceptional about Hazen's comment or its context that should relieve Essef of responsibility for its own compliance with the rules of procedure. *Cf. Endicott Johnson Corp.*, 116 F.3d at 57 (absent "exceptional circumstances, each party is responsible for knowing the pertinent procedural rules and principles and for taking such steps as are needed to protect its own interests.").

To be sure, this Court does not appear to have rendered a published opinion,[11] at least after *Pioneer*, in which we have *reversed* a district court's grant of an extension of time for

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[11] Under our court rules, summary order disposition is neither precedential nor may it be cited. 2d Cir. R. § 0.23 ("Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.").

"excusable neglect" because we concluded that it *was* an abuse of discretion, as opposed to affirming a district court's denial of a motion to extend time because it *was not* an abuse of discretion. But in light of the strong language in which we have affirmed such denials in circumstances similar to this one, we have no hesitation in concluding that reversal for abuse of discretion is warranted here. Other circuits have with some frequency reversed similar district court extensions of time for excusable neglect as abuses of discretion. *See, e.g., Lowry*, 211 F.3d at 464 (reversal (by the Eighth Circuit) of a district court's Rule 4(a)(5) extension because failure to calculate correctly the thirty-day appeal period was "garden variety attorney inattention," and "[i]f we were to apply the excusable neglect standard to require that we deem [the] neglect excusable in this case, it [would be] hard to fathom the kind of neglect that we would not deem excusable"); *Midwest Employers Cas. Co. v. Williams*, 161 F.3d 877, 879-80 (5th Cir.1998) (reversing Rule 4(a)(5) extension granted by district court when attorney mistakenly thought Fed. R.Civ.P. 6(e) gave him three extra days in which to file a motion for a new trial, which would have tolled the thirty-day Rule 4(a) period); *Advanced Estimating Sys.*, 130 F.3d at 998 (holding (by the Eleventh Circuit) that "as a matter of law, . . . an attorney's misunderstanding of the plain language of a rule cannot constitute excusable neglect such that a party is relieved of the consequences of failing to comply with a statutory deadline"); *Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132, 133-34 (7th Cir.1996) (dismissing appeal where district court granted Rule 4(a)(5) extension after attorney, disregarding Fed.R.Civ.P. 6(b), filed a late motion for a new trial, which failed to toll the Rule 4(a) period, because "[a]n unaccountable lapse is not excusable neglect. . . . [T]he rule is crystal clear, the error egregious, the excuses so thin as to leave the lapse not only unexcused but inexplicable. If there was 'excusable' neglect here, we have difficulty imagining a case of inexcusable neglect."); *Kyle v. Campbell Soup Co.*, 28

F.3d 928, 931-32 (9th Cir.) (holding that district court abused its discretion by granting Rule 4(a)(5) extension, when attorney had mistakenly believed that under Fed.R.Civ.P. 6(e) the Rule 4(a) period began three days after the judgment was mailed, because the rules were "nonambiguous"), *cert. denied*, 513 U.S. 867, 115 S.Ct. 185, 130 L.Ed.2d 119 (1994). We thus think ourselves compelled, on these facts, to conclude that the district court abused its discretion when it decided that Essef's counsel's determination of the wrong date by which Essef had to file a notice of appeal in sole reliance on a remark by counsel for another party during a scheduling conference for another appeal constituted excusable neglect.

B. Confusion in the Record

Essef argues that its neglect may also be excused because it resulted from confusion in the record and dockets regarding when and whether the Second Supplemental Judgment was appealable, an issue not explicitly decided by the district court. We agree with Essef that the proceedings in this case may be characterized as at times confused: The district court's first supplemental judgments, issued in November 2001, were not mailed to some parties. All of the cases were then reopened by the court's December 7 order. And the second Rule 54(b) order was not properly entered into the bellwether docket.

But none of this was the reason for Essef's failure to file its notice of appeal on time. Essef did not assert that it was misled or confused about whether the Second Supplemental Judgment was final and the time to appeal had therefore begun to run until—during the pendency of its Rule 4(a)(5) motion for an extension—Essef's counsel, Weaver, checked the *Silivanch* docket and learned that the January 25 Rule 54(b) order had not been entered there. Essef's original Rule 4(a)(5) motion justified the tardy filing by arguing only that Essef had "never received written notice of the entry of

judgment from which [it] appealed," Essef Mot. to Reopen the Time in Which to File a Notice of Appeal dated Apr. 3, 2002, at 1—an assertion that Essef later abandoned—and that it was misled by Celebrity's lawyer, Hazen, during the telephone conference.

And Essef did indeed receive clear notice that final judgment had been entered.[12] It could not have been confused about that. Weaver spoke to the Silivanches' counsel about the appeal, and noted March 4 on his calendar as the Rule 4(a) deadline, after the February 22 telephone conference. Neither discussing the impending appeal with an adversary nor calendaring the Rule 4(a) deadline seems to us to be consistent with doubt as to whether the time to appeal had begun to run.

While there may be circumstances in which the absence of a docket entry and similar factors create legitimate and excusable confusion, they are not present here. The district court implicitly so held when it identified a single cause for the late filing: the date mentioned by counsel during the scheduling conference, not Essef's confusion by the dockets and record. That finding was not clearly erroneous.

V. Essef's Other Ground for Appeal

Essef contends that because *Silivanch* was the "bellwether" case, a timely notice of appeal in that case confers jurisdiction to hear appeals in all of the related cases. But, as we have discussed, the notice of appeal filed in *Silivanch* was not

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[12] Essef's failure to dispute that it received the Rule 54(b) order, the Rule 58 Second Supplemental Judgment (citing Rule 54(b) and stamped "THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 1/28/02,") and Jacobs' letter (whose first line read "final judgment was entered . . . on January 28, 2002"), support our conclusion that Essef did, in fact, have actual notice that the Second Supplemental Judgments were final as of January 28, 2002.

timely. We therefore do not reach the issue of whether Essef's other appeals would have been timely if the *Silivanch* appeal was.

VI. Celebrity's Cross-Appeals

Celebrity asserts that its notices of cross-appeal were timely under Fed.R.App.P. 4(a)(3), which states that when "one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed." Celebrity acknowledges that "if Essef's appeal fails" because it was not timely filed, "Celebrity's cross appeal fails with it." Ltr. from Hazen to Francis, dated Apr. 17, 2002, at 1. Because Essef's notices of appeal were not timely, Celebrity's notices of cross-appeal were not timely either. We therefore lack jurisdiction over Celebrity's cross-appeals.

CONCLUSION

For the foregoing reasons, the plaintiffs' motion is granted and the parties' appeals and the cross-appeals are dismissed.

APPENDIX B

UNITED STATES DISTRICT COURT,
S.D. NEW YORK

No. 94 CIV. 5270(JCF), 94 CIV. 6147(JCF),
95 CIV. 0374(JCF).

In re: HORIZON CRUISES LITIGATION
In re: LITIGATION JOINT DISCOVERY M/V Horizon
Legionnaires Disease CELEBRITY CRUISES INC., and
FANTASIA CRUISING INC.,

Plaintiffs,

v.

ESSEF CORP., PAC-FAB, INC., AND
STRUCTURAL EUROPE, N.V. (F/N/A SFC),

Defendants.

May 15, 2002.

MEMORANDUM AND ORDER

FRANCIS, Magistrate J.

These related actions [1] were brought by passengers who contracted Legionnaire's Disease aboard a cruise ship owned and operated by Celebrity Cruises, Inc. and Fantasia Cruising, Inc. (collectively, "Celebrity"). Along with Celebrity, the plaintiffs sued Essef Corporation, Pac-Fab, Inc., and Structural Europe N.V. (collectively, "Essef"), which manufactured and distributed the filter for the whirlpool spa that was the source of the disease. The actions were consolidated for discovery, and one, *Silivanch v. Celebrity Cruises, Inc.*, was tried as a bellwether case, with findings as to liability and punitive damages to be applicable to all of the cases. Following a jury verdict holding the defendants liable and allocating fault among them, each of the individual compensatory damage claims was either tried or settled.

Judgments reflecting compensatory damages were initially entered in some of these cases, but these judgments were not immediately appealable since they did not resolve all issues, such as the allocation among the plaintiffs of the jury's punitive damage award. In November 2001 I issued a memorandum and order allocating punitive damages, together

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[1] The individual cases are: *Bentzley v. Celebrity Cruises,* 94 Civ. 1208(JCF), *Benzing v. Celebrity Cruises,* 95 Civ. 4795(JCF), *Buck v. Celebrity Cruises,* 95 Civ. 4359(JCF), *Cantone v. Celebrity Cruises,* 95 Civ. 4674(JCF), *Cesarski v. Celebrity Cruises,* 95 Civ. 4359(JCF), *DeFrancesco v. Celebrity Cruises,* 94 Civ. 6147(JCF), *Dillon v. Celebrity Cruises,* 95 Civ. 10062(JCF), *Galante v. Celebrity Cruises,* 95 Civ. 9571(JCF), *Hague v. Celebrity Cruises,* 95 Civ. 4648(JCF), *Jenkins v. Celebrity Cruises,* 95 Civ. 4000(JCF), *King v. Celebrity Cruises,* 95 Civ. 10062(JCF), *Lorenzo v. Celebrity Cruises,* 94 Civ. 9176(JCF), *Montes v. Celebrity Cruises,* 95 Civ. 1418(JCF), *Perlin v. Celebrity Cruises,* 95 Civ. 5039(JCF), *Purcell v. Celebrity Cruises,* 96 Civ. 0192(JCF), *Sckipp v. Celebrity Cruises,* 95 Civ. 4359(JCF), *Silivanch v. Celebrity Cruises,* 95 Civ. 0374(JCF), *Spaar v. Celebrity Cruises,* 95 Civ. 1957(JCF), *Stancati v. Celebrity Cruises,* 95 Civ. 9116(JCF), *Thomas v. Celebrity Cruises,* 95 Civ. 4751(JCF), *Tofano v. Celebrity Cruises,* 95 Civ. 5183(JCF), and *Viola v. Celebrity Cruises,* 95 Civ. 2726(JCF).

with supplemental judgments reflecting these awards. I also filed an order severing the claims by Celebrity against Essef and certifying the remaining issues for appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

However, the plaintiffs then moved for an award of prejudgment and postjudgment interest, and on December 7, 2001, I vacated the Rule 54(b) order and indicated that the cases should not be closed pending issuance of a further judgment. On January 23, 2002, I signed an order dealing with the interest question, and on January 25 I issued a new Rule 54(b) order along with Second Supplemental Judgments in each case. These judgments were entered by the Clerk of Court on January 28, 2002.

A number of postjudgment applications have now been filed, chief among them a motion by Essef to extend the time in which to file a notice of appeal. Since the Second Supplemental Judgments were filed on January 28, Essef's time to appeal expired on February 27, and its deadline to file a motion to extend the time to appeal pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure was March 29, 2002.

The first question is whether Essef's motion was itself timely filed and properly served. Although the motion was submitted to the Clerk of Court on March 29, it was apparently rejected because of a technical flaw.[2] That defect has been corrected, and the motion is therefore accepted as if it had actually been filed on March 29.

More significantly, the motion was served only on counsel in the *Silivanch* case, who also served as liaison counsel with

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[2] It appears that the Clerk's office should have filed the motion in any event. Pursuant to Rule 5(e) of the Federal Rules of Civil Procedure, "[t]he clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices."

respect to discovery and other matters. Counsel in the other individual cases only learned of the motion when they received my order establishing a briefing schedule. Each individual case was concluded with entry of a separate judgment, so there is little doubt that all counsel should have been served. However, improper service may be excused where there is actual notice together with exceptional good cause. *See Sally v. Board of Governors, University of North Carolina,* 136 F.R.D. 417, 420 (M.D.N.C.1991). That standard is met here. Counsel in all of the cases were on notice of Essef's motion when they received my scheduling order, and some chose to respond to the motion. Good cause exists because the prejudice to Essef if the motion were rejected is extraordinary: it would be deprived of the opportunity to appeal in any case except *Silivanch.* By contrast, the plaintiffs would not be prejudiced because they did, in fact, have the opportunity to contest the motion.

On the merits, it is appropriate to grant Essef's motion. Under Appellate Rule 4(a)(5)(A)(ii), the time to appeal may be extended if the moving party "shows excusable neglect or good cause." Here, counsel for Essef engaged in a telephone conference with staff counsel for the Second Circuit Court of Appeals on February 19, 2002, to discuss appeals filed by certain of the plaintiffs on the basis of the earlier judgments. (Declaration of Robin G. Weaver ("Weaver Decl."), attached as Exh. A to Essef Memorandum of Law, ¶ 19). During that conference, counsel for Celebrity stated that the deadline for appealing from the Second Supplemental Judgments was March 4, 2002. (Weaver Decl., ¶ 19; Declaration of James M. Hazen dated March 29, 2002, attached as Exh. B to Essef Memorandum of Law, ¶ 3). In reliance on that erroneous calculation, Essef did not file its notice of appeal until March 1, which was beyond the deadline. (Weaver Decl., ¶ 20). Excusable neglect may "encompass situations in which failure to comply with a filing deadline is attributable to negligence." *Pioneer Investment Services Co. v. Brunswick*

Associates L.P., 507 U.S. 380, 394 (1993) (discussing Fed.R.Civ.P. 60(b)). This is such a case.

Furthermore, when a party files for an extension of the time to file an appeal, "the court's sympathy will lie with the applicant: the hardship of being denied an appeal is great . . . , while the hardship to the prospective appellee is usually small." *O.P.M. Leasing Services, Inc. v. Far West Savings and Loan Association,* 769 F.2d 911, 916-17 (2d Cir.1985); *see also Bordeaux v. Lynch,* No. 95-CV-1761, 1997 WL 205289, at *1 (N.D.N.Y. April 23, 1997). As noted above, the prejudice to Essef of denying its motion would be significant, since it would be denied the opportunity to appeal a multimillion dollar verdict. The plaintiffs argue that further delay will be prejudicial to them because some may not live to see the end of this already lengthy litigation. But that prejudice is inherent in the appeal process and would exist even if Essef had filed a timely appeal. Thus, the balance of hardships tips in favor of Essef, and its motion is therefore granted.[3]

Two subsidiary issues remain. First, the *Silivanch* plaintiffs have moved pursuant to 28 U.S.C. § 1927 to sanction Essef for its motion. Although some of Essef's arguments were unfounded, it has ultimately prevailed on the motion. Accordingly, sanctions are not warranted.

Second, Essef has sought a stay of enforcement of the judgments pending appeal. That application is granted provided that Essef post a bond for the full amount of any judgment that it appeals from. To the extent that Essef does

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[3] Essef argued in what are effectively its reply papers that *no* appealable judgment has been entered even yet and that the Court should now direct the Clerk of Court to do so. This is an after-the-fact rationalization that is inconsistent with the record and with the contemporaneous understanding of all parties. Essef's application for a further order to the Clerk of Court is therefore denied.

not appeal from some portion of any judgment, it need not post a bond for the unappealed award, but, of course, the plaintiffs may execute on that segment of the judgment not appealed from.

Conclusion

For the reasons set forth above, Essef's motion to extend the time to file an appeal in each of the *Horizon* actions is granted and any notice of appeal shall be filed within ten days of today's date. Essef's application to direct the Clerk of Court to enter further judgments is denied. The *Silivanch* plaintiffs' motion for sanctions is denied. Finally, Essef's motion for a stay of execution of the judgments pending appeal is granted on the conditions set forth above.[4]

SO ORDERED.

[4] This Memorandum and Order shall be docketed in each of the individual cases identified in footnote 1 above.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall United States Court House
40 Foley Square
New York 10007

[Filed Aug. 28, 2003]

Dkt. No. 02-7595(L)
02-7229(L)
02-7611(L)
02-7615(L)

FREEMAN, BUCK, DEFRANCESCO,
Plaintiffs,

v.

CELEBRITY CRUISES, *et al.*,
Defendants-Cross-Appellants.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of August two thousand three.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Defendants-Appellants-Cross-Appellants Essef Corp., et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: /s/ Arthur M. Heller
Arthur M. Heller
Motions Staff Attorney

APPENDIX D

Fed. R. App. P. 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

* * * *

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

* * * *

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7111, 102 Stat. 4419; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

Fed. R. App. P. 4. Appeal as of Right—When Taken

(a) Appeals in Civil Cases.

* * * *

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

* * * *

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7111, 102 Stat. 4419.)